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No. 03-653

Supreme Court, U.S.
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In The

Supreme Court of the United States

EXTRUSIONS DIVISION, INC.,

Petitioner,

v.

SILVER CREEK DRAIN DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF OF PETITIONER

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The only parties to this proceeding are Petitioner and Respondent. Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent corporation and that no publicly held company owns 10% or more of Petitioner's stock.

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REPLY BRIEF OF PETITIONER

Extrusions' petition for certiorari presents a clear, substantial, and mature conflict between and among the Supreme Courts of Connecticut, Iowa, Michigan and New Jersey on an important question of federal law: how the concept of "just compensation" under the U.S. Constitution applies to condemned property that is environmentally contaminated (a "brownfield").

The Michigan Supreme Court, joining the Connecticut Supreme Court, held that the fact of contamination *must be* considered in determining just compensation because it is a factor relevant to market value. In contrast, the New Jersey and Iowa Supreme Courts have held that evidence of contamination *must not be* considered in determining just compensation because its effect on market value is uncertain, and because it deprives the owner of the due process protections the owner would have in an environmental cost-recovery action. Thus, those courts have held that environmental contamination can only be considered in a separate environmental cost-recovery action. This Court's intervention is the only way to resolve the conflict among the state Supreme Courts and restore uniformity to national takings jurisprudence.

The Michigan Supreme Court's decision is also demonstrably wrong. This Court has consistently held that the *sine qua non* of the just compensation analysis is to put the property owner in the position the owner would have been but for the taking. Market value is merely one means to measure just compensation and must be disregarded where, as in the case of contaminated property, it cannot be adequately determined or leads to a result which does not leave the property owner in the same position the owner was in before the taking. The Michigan Supreme Court's decision below ignored this Court's precedent, and this is a second and independent ground for granting the writ.

In an attempt to draw this Court's attention away from the state Supreme Court split and this Court's

previous decisions on the federal constitutional question, Respondent argues that the Michigan Supreme Court's decision merely interprets a state statutory scheme, which should be of no interest to this Court. There is no basis for this characterization. The Michigan Supreme Court did not analyze the language of Michigan's takings statute to determine whether the legislature intended to exclude issues of environmental contamination from just compensation trials. Indeed, it criticized the Michigan Court of Appeals for having engaged in such an analysis of the statutory language (App. 12a). Instead, the Michigan Supreme Court took a constitutional shortcut, holding that the statute could not mean that evidence of contamination be excluded from the just compensation determination because this would make the statute unconstitutional. This holding was based on the premise that "just compensation" under the U.S. Constitution means market value, and therefore any factor relevant to market value must be considered. This premise was not based on any analysis of the statutory language, but solely on the Michigan Supreme Court's reading of judicial decisions interpreting the United States and Michigan Constitutions (App. 7a-12a).

In sum, the constitutional issue is cleanly presented by the decision below; is of fundamental significance to the widespread urban brownfield redevelopment taking place across the country; and is in need of this Court's immediate resolution.

I. This Case Presents a Ripe and Mature Constitutional Conflict Among State Supreme Courts Regarding the Meaning of "Just Compensation" in the Context of Environmentally Contaminated Property.

As Petitioner has explained, the Supreme Courts of four states are divided over the Constitution's just compensation requirements in an environmental contamination context. Both the Iowa Supreme Court and the New Jersey Supreme Court have held that the Constitution

requires exclusion of contamination evidence, because its inclusion does not allow an innocent landowner to raise the liability defenses it has under environmental laws, and because it presents intractable appraisal problems. *Housing Auth. of the City of New Brunswick v. Suydam Investors, LLC*, 826 A.2d 673 (N.J. 2003); *Alladin, Inc. v. Black Hawk County, Iowa*, 562 N.W.2d 608 (Iowa 1997). *See also* Pet. 16-18. These courts have held that the issue of contamination must be resolved in a separate environmental cost-recovery action. In direct conflict, the Michigan Supreme Court has now joined the Connecticut Supreme Court in holding that admission of contamination evidence is the only method that is constitutional, because just compensation requires consideration of all elements that affect market value. *Northeast Conn. Econ. Alliance v. ATC P'ship*, 776 A.2d 1068 (Conn. 2001). *See also* Pet. 18-19.

Respondent does not deny this mature and divisive conflict among state Supreme Courts, which warrants resolution. S. Ct. Rule 10(b); Pet. 15-21. Instead, Respondent argues that the Michigan Supreme Court was engaged in nothing more than statutory interpretation of a state statute. But in holding that the just compensation determination must include consideration of environmental contamination, the Michigan Supreme Court did not undertake a "delicate and intricate" interpretation of Michigan's Uniform Condemnation Procedure Act as Respondent alleges. (Opp. 3.) Rather, it examined both its own decisions and the late 19th and early 20th century decisions of this Court, and then concluded that the federal and state constitutions require every element affecting a property's market value to be considered in a just compensation calculation. (App. 10a-11a.) As even Respondent concedes, "The Michigan Supreme Court [] determined the meaning of 'just compensation' . . . , reviewing both state and federal constitutional law." (Opp. 6.) The Michigan Supreme Court then concluded it could not "place the legislators in the posture of acting unconstitutionally" (App. 12a), and held that as a matter

of constitutional law, all factors affecting market value must be included in a just compensation analysis.

In fact, it is the Michigan Court of Appeals, not the Michigan Supreme Court, that engaged in the statutory analysis Respondent alleges, and the Court of Appeals held for Petitioner and the exclusion of the evidence of contamination. (Pet. 11-13.) And, it was this analysis that the Michigan Supreme Court specifically rejected, stating that the "Court of Appeals error was to utilize the plain-language doctrine in a context where it was inapplicable." (App. 12a.) Even the concurring and dissenting opinions in the Michigan Supreme Court acknowledged that the majority's decision was based on constitutional analysis. (*See* App. 15a, Cavanagh, J., concurring ("I would not reach the constitutional issue."); *id.*, Weaver, J., concurring in part and dissenting in part ("I write separately to express my disagreement with the majority's construction of the constitutional concept, 'just compensation.' ").)

The Michigan Supreme Court's decision is based solely on constitutional, not legislative, analysis, thus placing it among the deeply divided state Supreme Courts. The propriety of granting the writ in this case cannot be disputed.

II. The Michigan Supreme Court's Ruling is Inconsistent with this Court's Precedents.

The touchstone of just compensation is the full indemnification of the owner. *U.S. v. 564.54 Acres of Land*, 441 U.S. 506, 510-511, 99 S. Ct. 1854, 1857, 60 L. Ed. 2d 435 (1979). Market value is merely the "working rule." *Id.* Just last term, this Court reaffirmed the indemnity principle embodied in the Fifth Amendment's guarantee of just compensation: a private party "is entitled to be put in as good a position pecuniarily as if his property had not been taken." *Brown v. Legal Found. of Washington*, 538 U.S. 216, ___, 123 S. Ct. 1406, 1419, 155 L. Ed. 2d 376 (2003) (citation omitted). Thus, "*while the indemnity*

principle must yield to some extent before the need for a practical general rule, this Court has refused to designate market value as the sole measure of just compensation. For there are situations where this standard is inappropriate." *U.S. v. 564.54 Acres of Land*, 441 U.S. at 512, 99 S. Ct. at 1858 (emphasis added). *Accord U.S. v. Commodities Trading Corporation*, 339 U.S. 121, 123, 70 S. Ct. 547, 549, 94 L. Ed. 707 (1950) ("This Court has never attempted to prescribe a rigid rule for determining what is 'just compensation' under all circumstances and in all cases."); *U.S. v. General Motors Corporation*, 323 U.S. 373, 379, 65 S. Ct. 357, 360, 89 L. Ed. 311 (1945) ("In some cases this criterion [of market value] cannot be used either because the interest condemned has no market value or because, in the circumstances, market value furnishes an inappropriate measure of actual value.").

Environmentally contaminated property is one situation where the market value "working rule" is inappropriate. First and foremost, the market value approach violates the indemnity principle. It leaves the innocent property owner of environmentally contaminated property in a worse position than he would have been but for the taking. Here, for example, Petitioner purchased the contaminated subject property (an old high school football field) in 1982 for $106,000. (Pet. 7.) Petitioner did nothing with the vacant and unimproved field over the following 12 years except place a chain link fence around its perimeter. *Id.* By 1993, the year before the take, the local tax assessor valued the field, *as contaminated*, at $264,600 (Pet. 8), an increase of more than 150% over the purchase price. Yet, despite Respondent's acknowledgement that Petitioner was and is not responsible for any of the contamination existing on the field (Pet. 7), the trial court calculated "just compensation" at only $41,032. (Pet. 10.) In other words, the Michigan Supreme Court has endorsed a just compensation result that is less than 40% of the field's purchase price 12 years earlier, and only 15.5% of the field's 1993 assessed tax value, as contaminated. By any measure, that result does not leave Petitioner in the

same position it would have been in but for the taking.[1] Logic dictates that something is wrong in the Michigan Supreme Court's "all things considered" method of calculating just compensation. The "working rule" of "market value" is inappropriate where "an award of market value would diverge so substantially from the indemnity principle as to violate the Fifth Amendment." *U.S. v. 564.54 Acres of Land*, 441 U.S. at 513, 99 S.Ct. at 1858.

Second, market value of contaminated property is nearly impossible to determine, and it is appropriate to depart from the fair market value method where it is "impracticable" to determine market value. *Id.*; *accord* Opp. 11-12. As the Michigan Court of Appeals noted below: "Contaminated properties are like snow flakes; no two are alike. Thus, it is virtually impossible to find a comparable parcel of property on which to base an estimation of value." (App. 33a; *accord* 7A *Nichols on Eminent Domain* § 13B.04(1)(a) (2003) ("conditions and circumstances of each case are unique," so "[e]stimates of the value of contaminated property are necessarily speculative").)

The peculiar quality of each piece of contaminated property is why Respondent's expert appraiser acknowledged at trial that he was unqualified and unable to appraise the property "as contaminated."[2] (Pet. 9.) So, the

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[1] This is particularly true given that, one year after the take, the Michigan Legislature established separate cleanup standards for "industrial" properties under which the arsenic in the field's topsoil would have been acceptable for an industrial or manufacturing purpose, the field's highest and best use. (Pet. 9.) So, but for Respondent's condemnation, Petitioner would have had the full use value of its property *without ever paying a dime for environmental cleanup*.

[2] Respondent claims that "both parties offered expert testimony on the determination of fair market value" (Opp. 12), but in fact, both parties only offered expert testimony of the property's fair market value *as clean*. Neither was able to procure expert testimony of the property's fair market value as contaminated. (Pet. 9-10.)

trial court "solved" the problem by averaging the expert appraisals of the property as clean, and then deducting the average expert estimate of a hypothetical cleanup that never actually took place (Pet. 9-10), thus reaching its $41,032 just compensation figure. But the Appraisal Standard Board has issued an advisory opinion warning appraisers that it is inappropriate to simply deduct estimated cleanup costs from a property's market value. Appraisal Standards Board, *Uniform Standards of Professional Practice*, AO-09 (The Appraisal Foundation, 2003). Based on the disparity in the trial court's just compensation calculation ($41,032) versus the condemned property's tax assessed value as contaminated ($264,600), it is easy to see why the Board would issue such a warning. Thus, in appraising contaminated property appraisers are charged with the virtually impossible task of finding identical "snow flakes." The market value approach, in this context, is certainly "impracticable," if not impossible.

Respondent does not dispute that this Court has previously made exceptions to the "all things considered" market value approach, but instead argues that each of this Court's prior cases was "unique" and did not involve environmental contamination. (Opp. 9-12.) Respondent ignores the fact that two state Supreme Courts have considered contaminated property unique enough to abandon the "all things considered" formula in favor of an exclusion approach that better guarantees full indemnity. Respondent also ignores the fact that the two state Supreme Courts that held in favor of inclusion overturned unanimous lower court decisions favoring exclusion in doing so. (Pet. 13-14, 18-19.) Respondent further ignores that the boom in "brownfield" redevelopment and the reliance on condemnation as a means of securing ownership (Pet. 19-21.) is of recent origin and this Court has never before had the opportunity to opine on the just compensation analysis in an environmental contamination context. These are good reasons to grant the writ and resolve the vexing question that has divided the state Supreme Courts.

III. Condemnation of Environmentally Contaminated Property Improperly Combines Elements of *In Rem* and *In Personam* Proceedings, Unconstitutionally Depriving Owners of Just Compensation and Due Process.

Respondent claims that to separate the *in personam* and *in rem* proceedings would result in a windfall to property owners, who would then receive full market value for contaminated property as if the property was uncontaminated. (Opp. 13-16, 20-22.) To begin, this is a merits argument that goes to the heart of the divisions between the state Supreme Courts, which only serves to highlight the need for this Court's immediate review and resolution of the issue.

More substantively, Respondent's argument exists not in the real world, but in a theoretical one. In some cases, the condemning agency will recover remediation costs from the owner if the owner is responsible for the contamination. Michigan's exclusion statute allows the condemning agency to place such funds in escrow until after the just compensation and cost-recovery actions have been completed. (Pet. 5-7.) In others, the condemning agency will be successful in recovering remediation costs from responsible third parties. After all, in addition to "purchasing" the real property, Respondent has condemned the "stick" in Petitioner's bundle that gave Petitioner the right to pursue responsible parties. (Pet. 27.) In still others, the condemning agency will be able to take advantage of tax benefits and government subsidies to reimburse it for any necessary remediation (Pet. 20), as Respondent apparently did in this case. And in the rare situation where the owner is innocent, responsible third parties are not collectible, and there are no tax or other subsidies, that is the risk the condemning agency took when it decided to condemn the property. Property owners

do not get to choose when their property will be condemned; they are otherwise innocent parties who happen to be in the way of a public improvement project.[3]

In addition, the Michigan Supreme Court's approach resulted in a $41,032 just compensation award for property the local tax assessor valued at $264,600 as contaminated. In essence, Petitioner has been "dunned" for contamination it did not cause and would never have had to clean up. As the Michigan Court of Appeals below noted, "the inequity of deducting such costs before any determination of the landowner's liability is clear." (App. 31a.) Such an absurd result is possible in every case involving contaminated property because the landowner cannot raise in the *in rem* just compensation trial the *in personam* defense that he is not responsible for the contamination. (Pet. 6, 16-18, 26-28). The leading eminent domain treatise recognizes this problem: "Admitting evidence of contamination in the eminent domain trial to determine just compensation for property taken may blur the sharp divide between [*in rem* and *in personam*] actions and create inconsistencies." 7A *Nichols on Eminent Domain* § 13B.03(2)(a) (2003).

Respondent completely ignores these points, but it was for these and other reasons that the Supreme Courts of Iowa and New Jersey held that allowing admission of contamination evidence in a just compensation trial

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[3] As for Respondent's statutory argument regarding double recovery (Opp. 16-20), the argument is not pertinent to the certiorari decision; was rejected by the Michigan Court of Appeals (Pet. 11-13); went unaddressed in the Michigan Supreme Court (Pet. 13-14); is irrelevant given the Michigan Supreme Court's broad constitutional holding that evidence of contamination must always be included regardless of whether the condemning agency reserved or waived its right under Michigan law to bring a cost recovery action; and does not account for the condemning agency's acquisition of the right to sue third parties or to recover reimbursement from other governmental entities, as described above.

violates both due process and just compensation principles. (Pet. 16-18.) This constitutional issue is of obvious and immediate importance and warrants this Court's resolution.

CONCLUSION

The state Supreme Court split threatens national uniformity in takings jurisprudence, and the Michigan Supreme Court's decision undermines the owner's constitutional right to just compensation and due process. This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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